A

Bright World Trading Co Ltd & Ors v Director General of Inland Revenue & Anor and applications

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HIGH COURT (KOTA KINABALU) — APPLICATION FOR JUDICIAL REVIEW NO LBN-25JR-75/5 OF 2021, LBN-25JR-18/4 OF 2021 AND LBN-25–17/6 OF 2021
WONG SIONG TUNG J
18 MAY 2023

C

Administrative Law — Judicial review — Application for — Applications for judicial review against decisions of Deputy Director of the Inland Revenue and Minister of Finance subjecting Labuan business activities not listed in Schedule to Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 ('2018 Regulations'), as amended by Labuan Business Activity Tax (Requirements For Labuan Business Activity) 2018 (Amendment) Regulations 2020 ('2020 Regulations') to income tax under Income Tax Act 1967 — Whether 2018 Regulations which was made by Deputy Prime Minister ultra vires and invalid — Whether 2020 Regulations which amended 2018 Regulations invalid — Whether there were substance requirements prescribed for business activity of applicants — Whether there was specific provision to disqualify applicants to be taxed under Labuan Business Activity Tax Act 1990 — Whether Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 could have retrospective effect to take away vested right of applicants — Whether decisions adversely affected applicants — Whether applications for judicial review were filed out of time — Income Tax Act 1967 s 3B — Labuan Business Activity Tax Act 1990 ss 2, 2B(1)(a), (b), (2), 4 & 21 — Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 — Labuan Business Activity Tax (Requirements for Labuan Business Activity) 2018 (Amendment) Regulations 2020 — Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 — Labuan Companies Act 1990

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The applicants in the present case were companies incorporated in the Federal Territory of Labuan under the Labuan Companies Act 1990. This case was in relation to three judicial review applications filed by the applicants against the decision made by the Minister of Finance ('the MOF') in his letter dated 1 April 2021 to the Association of Labuan Trust Companies ('the ALTC') ('the MOF's decision') that endorsed and accepted the stance or position put forth by the Deputy Director of the Inland Revenue Board ('the DGIR') in a letter dated 5 February 2021, stating that Labuan business activities not listed in the Schedule to the Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 ('the 2018 Regulations'), as amended by the Labuan Business Activity Tax (Requirements for Labuan Business Activity)

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I

2018 (Amendment) Regulations 2020 ('the 2020 Regulations'), would automatically be subject to income tax under the Income Tax Act 1967 ('the ITA') and thus required to submit Tax Return Form ('ITRF') under the ITA ('the DGIR's decision'). Consequently, the applicants were no longer eligible for the lower tax rate of 3% on their chargeable profits under s 4 of the Labuan Business Activity Tax Act 1990 ('the LBATA'). The three judicial review applications which were heard together in the present case were part of 103 judicial review applications filed by the other applicants against the MOF's decision. These 103 applications for judicial review were tabulated under three different categories, namely category A, B and C. The three judicial review applications ('the three lead cases') presently heard by the court represented each of the said categories. The parties concerned in the said 103 judicial review applications had agreed that the decision of the court made in these three lead cases shall apply and bind all cases under respective categories. Following the filing of these judicial review applications, the MOF had passed the Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 ('the 2021 Regulations') which came into force retrospectively on 1 January 2019. Based on the 2021 Regulations, the applicants in category A and B would fall within item 20 of the First Schedule of the said regulations retrospectively and the applicants in category C would fall under item 2 of the Second Schedule of the said regulations retrospectively, as such, in order for the applicants to be eligible for the lower tax rate of 3% under the LBATA for years of assessment 2019 and 2020, they were required to meet the prescribed substance requirements as set out in the 2021 Regulations. The issues arose were as followed: (a) the legality of the 2018 Regulations made by the Deputy Prime Minister and amended by the 2020 Regulations made by the MOF; (b) no substance requirements prescribed for the business activity of applicants and no specific provision to disqualify applicants to be taxed under the LBATA; (c) the 2021 Regulations could not have retrospective effect to take away the vested right of the applicants; (d) whether the impugned letters from the DGIR and MOF adversely affected the applicants; and (e) the applicants' applications filed out of time.

Held, quashing the decisions of the MOF and DGIR, granting a declaration that the 2018 Regulations and the 2020 Regulations were invalid in law, granting a declaration that the 2021 Regulations only applied prospectively and not retrospectively on the applicants, and allowing costs of RM25,000 for each of the applicants in the three judicial review applications and RM1,000 for each of the remaining applicants in the applications as listed under category A, B and C except for the applicant in LBN-25JR-4/3 of 2021:

(1) The 2018 Regulations which first prescribed the substance requirements was made by the Deputy Prime Minister. However, pursuant to s 2 of the LBATA, the minister authorised to prescribe the substance requirements by regulations under s 2B(1)(b) of the LBATA was the minister for the

time being charged with the responsibility for finance, ie, the MOF. There were no provisions in the LBATA to empower or authorise the MOF or anybody to further sub-delegate the power to make regulations under ss 2B(1)(b) and 21 of the LBATA. Strictly construed, the 2018 Regulations were therefore ultra vires and invalid. That being the case, the 2020 Regulations made by the MOF to amend the invalid 2018 Regulations had no effect too. It ought to be noted that in the hearing of the applicants' applications for judicial review, the applicants were not precluded from calling into question the legality of these regulations (see paras 50–51, 57 & 59–61).

(2) As the 2018 Regulations and the 2020 Regulations were not validly made, therefore, as at the time the DGIR and the MOF issued their letters, the applicants were Labuan entities as specified in the Schedule referred to under s 2B(1)(a) of the LBATA carried on Labuan business activities without any substance requirements under s 2B(1)(b) lawfully prescribed by any valid regulations made and in force at the material times. Tax statutes had to be construed strictly. There must be clear and expressed provisions in the statutes to render a taxpayer liable to be charged to tax. Any ambiguity in the provisions in the tax statutes in that respect had to be construed in favour of a taxpayer. That being the case, at the material times the applicants therefore, were only subject to be charged to tax under s 4 of the LBATA and not under s 3B of the ITA. Considering the above findings, the letters by the DGIR and the MOF were therefore made without expressly authorised by the law and thus, in excess of authority (see paras 62–65).

(3) The court disagreed that the matters had become academic because of the making of the 2021 Regulations, particularly in view of the findings that the 2018 Regulations and the 2020 Regulations were invalid. Firstly, the respondents seemed to maintain the validity of their decisions made in their letters dated 5 February 2021 and 1 April 2021 respectively. Secondly, the 2021 Regulations were made to apply retrospectively with effect on 1 January 2019. To require the applicants to go back in time to comply with the substance requirements retrospectively was a grave injustice to the applicants. The legislature could not have intended to confer such authority or power upon the MOF or delegate the authority or power to prescribe the Substance Requirement to apply retrospectively through the provisions of ss 2B(2) and 21 of LBATA for the purpose of making regulations. There was no express provision in the LBATA which empowered the MOF to make regulations to apply retrospectively. The applicants had the vested rights as Labuan entities with business activities not required to satisfy any Substance Requirement and entitled to the benefit of being subjected to be charged to tax at a lower rate under the LBATA before the making of the 2021 Regulations. The 2021

Regulations could not take away the vested rights of the applicants. The 2021 Regulations applied only to the applicants prospectively (see paras 71–74, 77–78 & 81).

(4) Based on the reasons as given in the court's grounds of decision dated 2 September 2021 in relation to the leave application for judicial review, the court maintained its finding that the action by the two letters of the respondents respectively had adversely affected the applicants and therefore amenable to judicial review (see para 85).

(5) The court disagreed with the respondents' submission that the applications herein were filed out of time because the grounds for the applications first arose and were communicated when the 2018 Regulations were gazetted on 31 December 2018. Firstly, the impugned decisions or actions being challenged were the two letters dated 5 February 2021 and 1 April 2021 issued by the respondents respectively, which were based on the validity of the 2018 Regulations that the court had found to be invalid. The applicants were entitled to apply for judicial review of the decisions in or actions by the two impugned letters of the respondents respectively without first applying to set aside the 2018 Regulations on the ground of their invalidity. As previously held by the court, the applicants were not precluded from contending that the 2018 Regulations were invalid in their applications for judicial review (see paras 86–89).

[Bahasa Malaysia summary

Pemohon-pemohon dalam kes ini adalah syarikat-syarikat yang diperbadankan di Wilayah Persekutuan Labuan di bawah Akta Syarikat Labuan 1990. Kes ini berkaitan dengan tiga permohonan semakan kehakiman yang difailkan oleh pemohon-pemohon terhadap keputusan yang dibuat oleh Menteri Kewangan ('MK') dalam suratnya bertarikh 1 April 2021 kepada Persatuan Syarikat Amanah Labuan (ALTC) ('keputusan MK') yang mengesahkan dan menerima pendirian atau kedudukan yang dikemukakan oleh Timbalan Pengarah Lembaga Hasil Dalam Negeri ('KPHDN') dalam surat bertarikh 5 Februari 2021, menyatakan bahawa aktiviti perniagaan Labuan yang tidak disenaraikan dalam Jadual kepada Peraturan-Peraturan Cukai Aktiviti Perniagaan Labuan (Kehendak Bagi Aktiviti Perniagaan Labuan) 2018 ('Peraturan 2018'), sebagaimana yang dipinda oleh Peraturan-Peraturan Cukai Aktiviti Perniagaan Labuan (Kehendak Bagi Aktiviti Perniagaan Labuan) 2018 (Pindaan) 2020 ('Peraturan 2020'), secara automatik akan tertakluk kepada cukai pendapatan di bawah Akta Cukai Pendapatan 1967 ('ACP') dan oleh itu dikehendaki menyerahkan Borang Nyata Cukai (BNC) di bawah ACP ('keputusan KPHDN'). Akibatnya, pemohon tidak lagi layak untuk kadar cukai yang lebih rendah sebanyak 3% ke atas keuntungan bercukai mereka di bawah s 4 Akta Cukai Aktiviti Perniagaan Labuan 1990 ('ACAPL'). Tiga permohonan semakan kehakiman yang

didengar bersama dalam kes ini adalah sebahagian daripada 103 permohonan semakan kehakiman yang difailkan oleh pemohon-pemohon lain terhadap keputusan MK. Kesemua 103 permohonan untuk semakan kehakiman ini telah diletakkan di bawah tiga kategori berbeza, iaitu kategori A, B dan C. Tiga permohonan semakan kehakiman ('tiga kes utama') yang didengar oleh mahkamah pada masa ini mewakili setiap kategori tersebut. Pihak-pihak yang berkenaan dalam 103 permohonan semakan kehakiman tersebut telah bersetuju bahawa keputusan mahkamah yang dibuat dalam tiga kes utama ini hendaklah terpakai dan mengikat semua kes di bawah kategori masing-masing. Berikutan pemfailan permohonan semakan kehakiman ini, MK telah meluluskan Peraturan-Peraturan Cukai Aktiviti Perniagaan Labuan (Kehendak Bagi Aktiviti Perniagaan Labuan) 2021 ('Peraturan 2021') yang berkuat kuasa secara retrospektif pada 1 Januari 2019. Berdasarkan Peraturan 2021, pemohon-pemohon dalam kategori A dan B akan termasuk dalam butiran 20 Jadual Pertama peraturan tersebut secara retrospektif dan pemohon-pemohon dalam kategori C akan termasuk di bawah butiran 2 Jadual Kedua peraturan tersebut secara retrospektif, oleh itu, untuk memastikan pemohon-pemohon layak mendapat kadar cukai yang lebih rendah sebanyak 3% di bawah ACAPL bagi tahun taksiran 2019 dan 2020, mereka dikehendaki memenuhi Keperluan Fizikal yang ditetapkan dalam Peraturan 2021. Isu-isu yang timbul adalah seperti berikut: (a) keabsahan Peraturan 2018 yang dibuat oleh Timbalan Perdana Menteri dan dipinda oleh Peraturan 2020 yang dibuat oleh MK; (b) tiada Keperluan Fizikal yang ditetapkan untuk aktiviti perniagaan pemohon-pemohon dan tiada peruntukan khusus untuk membatalkan kelayakan pemohon-pemohon untuk dikenakan cukai di bawah ACAPL; (c) Peraturan 2021 tidak boleh mempunyai kesan retrospektif untuk mengambil hak kukuh pemohon-pemohon; (d) sama ada surat-surat yang disangkal daripada KPHDN dan MK memberi kesan buruk kepada pemohon; dan (e) permohonan pemohon-pemohon difailkan di luar masa yang ditetapkan.

Diputuskan, membatalkan keputusan MK dan KPHDN, memberikan pengisytiharan bahawa Peraturan 2018 dan Peraturan 2020 adalah tidak sah di sisi undang-undang, memberikan pengisytiharan bahawa Peraturan 2021 hanya terpakai secara prospektif dan bukan retrospektif ke atas pemohon-pemohon, dan membenarkan kos RM25,000 untuk setiap pemohon dalam tiga permohonan semakan kehakiman dan RM1,000 bagi setiap baki pemohon dalam permohonan-permohonan seperti yang disenaraikan di bawah kategori A, B dan C kecuali pemohon dalam LBN-25JR-4/3 Tahun 2021:

(1) Peraturan 2018 yang mula-mula menetapkan Keperluan Fizikal adalah dibuat oleh Timbalan Perdana Menteri. Walau bagaimanapun, menurut s 2 ACAPL, menteri yang diberi kuasa untuk menetapkan Keperluan Fizikal mengikut peraturan di bawah s 2B(1)(b) ACAPL adalah menteri

yang pada masa tersebut dipertanggungjawabkan dengan tanggungjawab untuk kewangan, iaitu MK. Tiada peruntukan dalam ACAPL untuk memberi kuasa atau membenarkan MK atau sesiapa sahaja untuk mewakilkan lagi kuasa untuk membuat peraturan di bawah ss 2B(1)(b) dan 21 ACAPL. Apabila ditafsirkan dengan tegas, maka Peraturan 2018 adalah ultra vires dan tidak sah. Oleh itu, Peraturan 2020 yang dibuat oleh MK untuk meminda Peraturan 2018 yang tidak sah juga tidak mempunyai kesan. Perlu diingat bahawa dalam pendengaran permohonan pemohon-pemohon untuk semakan kehakiman, pemohon-pemohon tidak dihalang daripada mempersoalkan keabsahan peraturan-peraturan ini (lihat perenggan 50–51, 57 & 59–61).

(2) Memandangkan Peraturan 2018 dan Peraturan 2020 tidak dibuat secara sah, oleh itu, pada masa KPHDN dan MK mengeluarkan surat mereka, pemohon-pemohon adalah entiti Labuan seperti yang dinyatakan dalam Jadual yang dirujuk di bawah s 2B(1)(a) ACAPL yang menjalankan aktiviti perniagaan Labuan tanpa apa-apa keperluan fizikal di bawah s 2B(1)(b) yang ditetapkan secara sah oleh mana-mana peraturan sah yang dibuat dan berkuat kuasa pada masa yang material. Perundangan cukai perlu ditafsirkan dengan ketat. Perlu ada peruntukan yang jelas dan dinyatakan dalam statut untuk menyebabkan pembayar cukai bertanggungjawab dikenakan cukai. Apa-apa kekaburan dalam peruntukan statut cukai dalam hal tersebut perlu ditafsirkan memihak kepada pembayar cukai. Oleh itu, pada masa yang material, pemohon-pemohon hanya tertakluk kepada cukai di bawah s 4 ACAPL dan bukan di bawah s 3B ACP. Dengan mengambil kira dapatan di atas, surat oleh KPHDN dan MK telah dibuat tanpa kebenaran undang-undang dan dengan itu, melebihi kuasa (lihat perenggan 62–65).

(3) Mahkamah tidak bersetuju bahawa perkara tersebut menjadi akademik kerana penggubalan Peraturan 2021, terutamanya memandangkan dapatan bahawa Peraturan 2018 dan Peraturan 2020 adalah tidak sah. Pertama, responden kelihatan mengekalkan keabsahan keputusan yang dibuat dalam surat mereka masing-masing bertarikh 5 Februari 2021 dan 1 April 2021. Kedua, Peraturan 2021 tersebut telah dibuat untuk diguna pakai secara retrospektif berkuat kuasa 1 Januari 2019. Menghendaki pemohon-pemohon kembali ke masa lalu untuk mematuhi Keperluan Fizikal secara retrospektif adalah satu ketidakadilan yang besar kepada pemohon-pemohon. Tidak mungkin badan perundangan berniat untuk memberikan kuasa kepada MK atau mewakilkan kuasa untuk menetapkan Keperluan Fizikal untuk digunakan secara retrospektif melalui peruntukan ss 2B(2) dan 21 ACAPL bagi tujuan membuat peraturan. Tiada peruntukan nyata dalam ACAPL yang memberi kuasa kepada MK untuk membuat peraturan-peraturan untuk digunakan secara retrospektif. Pemohon-pemohon mempunyai hak kukuh sebagai

entiti Labuan dengan aktiviti perniagaan yang tidak diperlukan untuk memenuhi apa-apa Keperluan Fizikal dan berhak mendapat faedah untuk dikenakan cukai pada kadar yang lebih rendah di bawah ACAPL sebelum Peraturan 2021 dibuat. Peraturan 2021 tidak boleh mengambil hak kukuh pemohon-pemohon. Peraturan 2021 terpakai hanya ke atas pemohon-pemohon secara prospektif (lihat perenggan 71–74, 77–78 & 81).

(4) Berdasarkan alasan-alasan seperti yang diberikan dalam alasan penghakiman mahkamah bertarikh 2 September 2021 berhubung permohonan kebenaran untuk semakan kehakiman, mahkamah mengekalkan keputusannya bahawa tindakan melalui kedua-dua surat responden-responden telah memberi kesan buruk kepada pemohon-pemohon dan oleh itu boleh disemak melalui semakan kehakiman (lihat perenggan 85).

(5) Mahkamah tidak bersetuju dengan hujahan responden-responden bahawa permohonan-permohonan di sini difailkan di luar masa dengan alasan bahawa permohonan-permohonan tersebut mula timbul dan telah dimaklumkan apabila Peraturan 2018 diwartakan pada 31 Disember 2018. Pertamanya, keputusan atau tindakan yang disangkal yang dicabar ialah dua surat bertarikh 5 Februari 2021 dan 1 April 2021 yang dikeluarkan oleh responden-responden berdasarkan keabsahan Peraturan 2018 yang mahkamah dapati tidak sah. Pemohon-pemohon berhak memohon semakan kehakiman terhadap keputusan atau tindakan oleh dua surat responden-responden tersebut tanpa terlebih dahulu memohon untuk mengenepikan Peraturan 2018 atas alasan ketidakabsahannya. Seperti yang diputuskan oleh mahkamah sebelum ini, pemohon-pemohon tidak dihalang daripada berhujah bahawa Peraturan 2018 adalah tidak sah dalam permohonan-permohonan mereka untuk semakan kehakiman (lihat perenggan 86-89).]

Cases referred to

Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281; [2020] 1 CLJ 162, FC (refd)

Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal [2020] 4 MLJ 773, FC (refd)

Director-General of Inland Revenue v Highlands Malaya Plantations Ltd [1988] 2 MLJ 99, SC (refd)

Engineering Analysis Centre of Excellence Private Ltd v Commissioner of Income Tax and another 23 ITLR 569. SC (refd)

Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri [2006] 1 MLJ 428, CA (refd)

Kerajaan Malaysia v Wong Pot Heng & Anor [1997] 1 MLJ 437, FC (refd)

Ketua Pengarah Hasil Dalam Negeri v Malaysian Co-Operative Insurance Society Ltd [2000] 1 MLJ 561, CA (refd)
M Ratnavale v The Government of The Federation of Malaya [1963] 1 MLJ 393 (refd)
Multi-Purpose Holdings Bhd v Ketua Pengarah Hasil Dalam Negeri [2006] 2 MLJ 498, CA (refd)
National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99, SC (refd)
PP v Kit Chee Wan [1999] 1 MLJ 16, HC (refd)
PP v Tan Kim Yong [1997] MLJU 125; [1998] 1 CLJ 74, HC (refd)
Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri [2018] 1 MLJ 376, CA (refd)
State Public Service Commission, Sarawak v Sarjit Singh Khaira [2000] 4 MLJ 353, FC (refd)
Syed Ibrahim bin Syed Mohd & Ors v Esso Production Malaysia Incorporated [2004] 2 MLJ 49, CA (refd)
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1, FC (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)

Legislation referred to

Finance Act 2018 ss 74, 76
Finance Act 2019 s 71(2)
Finance Act 2020
Income Tax Act 1967
Interpretation Acts 1948 and 1967 ss 8(2), 20, 30
Labuan Companies Act 1990
Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018
Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 First Schedule, Item 20, Second Schedule
Labuan Business Tax Activity Tax Act 1990 ss 2, 2(1), 2A, 2A(1), 2B, (1), (1)(a), (1)(b), (1A), (2), 3A, 3B, 4 , 7, 21, 21(1)(a)
Ministerial Functions Act 1969 s 2

Anand Raj (with Irene Yong, Foong Pui Chi, Yeoh Yu Xian and Analise Cheong) (Shearn Delamore & Co) for the applicant.
Mohd Hafizi bin Abdul Halim (with Fazriel Fardiansyah) (Federal Counsel, Attorney General's Chambers) for the first respondent.
Mohammad Hafidz bin Ahmad (with Ahmad Isyak bin Mohd Hassan) (Inland Revenue Board Malaysia) for the second respondent.

Wong Siong Tung J:

INTRODUCTION

[1] The three applications for judicial review, namely Application for Judicial Review No LBN-25JR-75/5 of 2021 (HC); Application for Judicial Review No LBN-25JR-18/4 of 2021 (HC) and Application for Judicial Review No LBN-25–17/6 of 2021 (HC) were heard together.

[2] There were 103 similar applications for judicial review by various parties. The applications for judicial review heard together were among three of them.

[3] All the applicants in these 103 applications for judicial review were companies incorporated in the Federal Territory of Labuan under the Labuan Companies Act 1990 (Act 441).

[4] All the applicants in these applications for judicial review were said to be adversely affected by the alleged decisions made by the Minister of Finance ('MOF') in his letter dated 1 April 2021.

[5] They all concerned the legal issues arising from Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 (PU(A) 392/2018) and Labuan Business Activity Tax (Requirements for Labuan Business Activity) 2018 (Amendment) Regulations 2020 (PU(A) 375/2020), particularly concerning the entitlement of these applicants to be charged a lower tax at 3% on their chargeable profits under s 4 of the Labuan Business Tax Activity Tax Act 1990 (Act 445).

[6] These 103 applications for judicial review were tabulated under three different categories, namely category A, B and C as attached hereto.

[7] The parties concerned have agreed that the three cases heard by the court together should be the lead cases for the three categories cases as listed respectively in the tabulation.

[8] The parties concerned have agreed that the decision of the court made in these three lead cases shall apply and bind all cases under respective categories.

[9] On 2 September 2021, leave was granted to the applicants in the three lead cases to make application for judicial review for the reliefs as they prayed for.

[10] Thus, pursuant to the leave as granted, all the applicants in the three lead cases have filed their applications for judicial review which are heard together.

BRIEF BACKGROUNDS AND LEGISLATIVE CHANGES

[11] The Labuan Companies Act 1990 (Act 441) was enacted in 1990 to provide for the incorporation, registration and administration of Labuan companies and foreign Labuan companies and for matters connected therewith. It came into force on 1 October 1990.

[12] In the same year, the Labuan Offshore Business Activity Tax Act 1990 (Act 445) was enacted to provide for the imposition, assessment and collection of tax on a Labuan business activity carried on by a Labuan entity in or from Labuan and for matters connected therewith. It also came into force on 1 October 1990.

[13] Under the Labuan Offshore Business Activity Tax Act 1990 (Act 445), an offshore company as defined therein carrying on an offshore business activity which is an offshore trading activity can elect to pay tax at the rate of 3% of the net profit under s 4 of the said Act or to pay a flat tax of RM20,000 under s 7 of the said Act.

[14] The Offshore Companies Act 1990 (Act 441) was amended and renamed as Labuan Companies Act 1990 (Act 441) ('the LCA') by Offshore Companies (Amendment) Act 2010 (Act A1367) which came into effect on 11 February 2010.

[15] The Labuan Offshore Business Activity Tax Act 1990 (Act 445) was also amended and renamed as Labuan Business Activity Tax Act 1990 (Act 445) ('LBATA') by Labuan Offshore Business Activity Tax (Amendment) Act 2010 (Act A1366) which came to into force on 11 February 2010.

[16] There were various amendments made to the LBATA subsequently.

[17] The s 76 of the Finance Act 2018 (Act 812) deleted s 7 of the LBATA, thus abolish the option to pay a flat tax of RM20,000 which by s 71(2) of the Finance Act 2019 (Act 823) comes into effect for the year of assessment 2020 and the years thereafter.

[18] The effect following the amendments made by the Finance Act 2018 (Act 812), and the Finance Act 2019 (Act 823) was that a Labuan entity engaged in Labuan business activity was subject to tax of 3% on its chargeable

profits for the specified year of assessment under s 4 of the LBATA without the option to pay a flat tax of RM20,000.

[19] Section 2A(1) of the LBATA then conferred on the MOF the power on the recommendation of the Director General in writing to designate any activity carried on by any Labuan entity as a Labuan business activity.

[20] Section 2B(1) of the LBATA (which came into effect on 1 January 2019 as amended by s 74 of the Finance Act 2018 [Act 812],) then provided that:

> (1) The Labuan entities —
>
> (a) shall be as specified in the Schedule; and
>
> (b) shall, for the purpose of the Labuan business activity, have —
>
> (i) an adequate number of full time employees in Labuan; and
>
> (ii) an adequate amount of annual operating expenditure in Labuan,
>
> as prescribed by the Minister by regulations made under this Act.
>
> (2) The Minister may, upon the recommendation of the Director General, by order published in the Gazette, amend the Schedule including for the purposes of declaring any other person as a Labuan entity.

[21] The Schedule of Labuan entity of LBATA is reproduced as follows:

> SCHEDULE
>
> [Section 2B]
>
> LABUAN ENTITY
>
> 1. *A Labuan company*
> 2. A Labuan foundation established and registered under the Labuan Foundations Act 2010 [Act]
> 3. A Labuan Islamic foundation established and registered under the Labuan Islamic Financial Services and Securities Act 2010
> 4. A Labuan Islamic partnership as defined in the Labuan Islamic Financial Services and Securities Act 2010
> 5. A Labuan limited partnership established and registered under the Labuan Limited Partnerships and Limited Liability Partnerships Act 2010
> 6. A Labuan limited liability partnership established and registered under the Labuan Limited Partnerships and Limited Liability Partnerships Act 2010
> 7. A Labuan Islamic trust as defined in the Labuan Islamic Financial Services and Securities Act 2010
> 8. A Labuan trust as defined in the Labuan Trusts Act 1996 [Act 554]

9. A Malaysian Islamic bank licensee as defined in the Labuan Islamic Financial Services and Securities Act 2010

10. A Malaysian bank licensee as defined in the Labuan Financial Services and Securities Act 2010

11. Any Labuan financial institutions as defined in the Labuan Financial Services Authority Act 1996 [Act 545]

12. Any person declared by the Minister to be a Labuan entity under subsection 2B(2).

[22] It is indisputable that all the applicants in the three lead cases are Labuan companies as defined under s 2(1) of the LBATA and thus Labuan entities.

[23] With the amendments introduced by the Finance Act 2018 (Act 812) (ie s 76) and the Finance Act 2019 (Act 823) (ie s 71(2)), though the Labuan entity no longer has the option to choose a flat tax rate RM20,000 for year of assessment for 2020 and the subsequent years, a Labuan entity however may under s 3A of the LBATA, elect to have its chargeable profits subjected to tax under the Income Tax Act 1967. Once the election is made, it becomes irrevocable.

[24] On 31 December 2018, pursuant to s 21(1)(a) of the LBATA then read together with s 2B(1)(b) of the LBATA, the Deputy Prime Minister promulgated the Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 (PU(A) 392/2018) ('the 2018 Regulations') which came into effect on 1 January 2019.

[25] The 2018 Regulations provided a list of 21 of Labuan entities that carried out the different kinds of business activities as described and prescribed each of them with the minimum number of full time employees and the minimum amount of annual operating expenditure in Labuan ('substance requirements') for the purpose of the Labuan business activity of the Labuan entity as required under s 2B(1)(b) of the LBATA to entitle to be subjected to a lower tax at 3% on their chargeable profits under s 4 of the LBATA.

[26] On 28 January 2020, the Labuan Business Activity Tax (Amendment) Act 2020 (Act A1614) was enacted and came into force on 10 February 2020 which further amended LBATA by inserting a new s 2B(1A) therein which provided that:

> 2B(1A) A Labuan entity carrying on a Labuan business activity *which fails to comply with regulations* made under subsection (1) for a basis period for a year of assessment shall be charged to tax at the rate of twenty four per cent upon its chargeable profits for that year of assessment (Emphasis added.)

[27] Section 1 of the Labuan Business Activity Tax (Amendment) Act 2020 [Act A1614] stipulated that the newly inserted s 2B(1A) in the LBATA would take effect from the year of assessment 2020 and the subsequent years if assessment.

[28] On 23 December 2020, the MOF further made the Labuan Business Activity Tax (Requirements for Labuan Business Activity) 2018 (Amendment) Regulations 2020 (PU(A) 375/2020) ('the 2020 Regulations').

[29] The 2020 Regulations introduced changes to the substance requirements for specific items listed in the business activities of Labuan entities, as originally set out in the 2018 Regulations.

[30] Among the amendments, item 22 was added to the list of business activities, specifically directed at Labuan entities that 'undertakes pure equity holding activities' and also prescribed the corresponding substance requirements.

[31] Furthermore, the 2020 Regulations also provided that the provisions therein are deemed to have come into operation retrospectively on 1 January 2019.

[32] On 31 December 2020, the Finance Act 2020 [Act 831] was enacted which further amended s 2B of the LBATA and rendered it to read as follows:

> 2B Labuan entity
>
> (1) The Labuan entities —
>
> (a) shall be as specified in the Schedule; and
>
> (b) shall, for the purposes of the Labuan business activity —
>
> (i) in relation to a Labuan trading activity —
> (A) have an adequate amount of annual operating expenditure in Labuan,
> (B) have an adequate number of full time employees in Labuan; and
> as prescribed by the Minister by regulations made under this Act; and
>
> (ii) in relation to a Labuan non-trading activity —
> (A) have an adequate number of full time employees in Labuan;
> (B) have an adequate amount of annual operating expenditure in Labuan; and
> (C) comply with any condition in relation to control and management in Labuan,
>
> as prescribed by the Minister by regulations made under this Act.
>
> [(1) Subs. Act 812: s.74; (b) Subs. Act 831:s.56]
>
> (1A) *A Labuan entity carrying on a Labuan business activity which fails to comply with*

regulations made under subsection (1) for a basis period for a year of assessment shall be charged to tax at the rate of twenty four per cent upon its chargeable profits for that year of assessment.

[(1A) Ins. Act A1614: s.3]

(1B) *For the purposes of subsection (1A) —*

(a) the chargeable profits shall be the net profits as reflected in the audited accounts in respect of such Labuan business activity of the Labuan entity for the basis period for that year of assessment; and

(b) sections 6, 6A, 6B, 6C, 6D, 8 and 8A shall apply, with necessary modifications.

[(1B) Ins. Act 831: s.56]

(2) *The Minister may, upon the recommendation of the Director General, by order published in the Gazette, amend the Schedule including for the purposes of declaring any other person as a Labuan entity.*

[2B. Ins. Act A1366: s.5]

[33] There is no serious dispute that the applicants in Application for Judicial Review No LBN-25JR-75/5 of 2021 (HC) (Category A) and in Application for Judicial Review No LBN-25JR-18/4 of 2021 (HC) (Category B) along with their respective business activities were not listed in the list of Labuan entities specified under the 2018 Regulations as amended by the 2020 Regulations. Essentially, their business activities did not fall within any of the 22 Labuan entities outlined in the 2018 Regulations, as amended by the 2020 Regulations.

[34] The applicants in the Application for Judicial Review No LBN-25–17/6 of 2021 (HC) (Category C) claimed that they were not listed among the 22 Labuan entities specified in the 2018 Regulation as amended by the 2020 Regulation and that their business activities, categorised as 'Labuan non-trading activity' were granted tax exemption by the Ministry of Finance ('MOF') under s 2A of the LBATA prior to the enactment of these regulations.

[35] Subsequently, the Deputy Director of the Inland Revenue Board issued a letter dated 5 February 2021 (exh TKS66 at p 6197–6214 of encl 4 in Judicial Review No LBN-25JR-75/5 of 2021) to the Association of Labuan Trust Companies ('ALTC'), of which the applicants were members. In the letter, the Deputy Director of the Inland Revenue Board stated that the 2020 Regulations 'has caused Labuan entity carrying on 'Other Trading' activities not to be included in the meaning of 'Labuan Entity' under sub-s 2B(1) of the Labuan Business Activity Tax Act ('the LBATA') 1990 and *are required to submit Tax Return Form (ITRF) under Income Tax Act 1967 ('the ITA')*.

[36] In the aforementioned letter, the Deputy Director of the Inland Revenue also specified the deadlines for submitting the tax returns under the Income Tax Act 1967 ('the ITA 1967') for the year of assessment 2019 and subsequent years.

[37] The Deputy Director of the Inland Revenue Board requested that the contents of the letter be disseminated to all members of the ALTC.

[38] Thereafter, by a letter dated 1 April 2021 (exh TKS65 at pp 6192–6196 of encl 4 in Judicial Review No LBN-25JR-75/5 of 2021) written by MOF to ALTC the MOF responded to various earlier letters from ALTC regarding the position of Labuan entities not listed or specified with substance requirements under the 2020 Regulations. The MOF stated his position on the matter under item 2 in the tabulation in Lampiran 1 which is reproduced as follows:

Bil	Isu Berbangkit	Keputusan YB Menteri Kewangan
1.	...	
2.	The clarification notes/pronouncement that were issued does not cover all the other trading entities such as general/ good/trading/consultancy/ IT services etc.	Isu yang dibankitan tidak berbangkit
	Labuan entities carrying on non-listed activities are to be taxed under ITA 1967 and not LBATA 1990 contrary to Malaysian Law and well-established taxing principles, and universally held taxation principles. Non listed activities would continue to be taxed under LBATA 1990 at 3% if the activities fall under the definition of 'Labuan Trading Activity'.	ALTC diminta untuk merujuk kepada perundangan yang sah di mana pronouncement yang dibuat oleh LFSA adalah tidak sah selagi mana ianya tidak diwartakan mengikut saluran perundangan.
		Aktiviti general trading and services tidak dimasukkan sebagai salah satu aktiviti Labuan kerana aktiviti ini tidak termasuk dalam aktiviti Pusat Perniagaan dan Kewangan Antarabangsa Labuan.

		Bagi aktiviti perniagaan yang tidak tersenarai adalah secara automatik tertakluk kepada pengenaan cukai pendapatan di bawah ACP 1967. Insentif galakan cukai untuk aktiviti perdagangan ada ditawarkan di bawah Akta Cukai Pendapatan 1967 melalui insentif percukaian Hab Prinsipal dan Syarikat Perdagangan Antarabangsa Malaysia (MITC) tertakluk kepada syarat yang ditetapkan.
3.	...	

[39] The MOF endorsed and accepted the stance or position put forth by the Deputy Director of the Inland Revenue Board, stating that Labuan business activities not listed in the Schedule to the 2018 Regulations, as amended by the 2020 Regulations, would automatically be subject to income tax under the ITA 1967 and thus required to submit Tax Return Form (ITRF) under Income Tax Act (the ITA) 1967. Consequently, the applicants were no longer eligible for the lower tax rate of 3% on their chargeable profits under s 4 of the LBATA.

[40] Thereafter, all the applicants filed the applications seeking leave to apply for judicial review of the decision as they contended made by the MOF in his letter dated 1 April 2021. On 2 September 2021, their applications for leave were granted.

[41] Following these developments, on 19 November 2021, the MOF made the Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2021 ('the 2021 Regulations').

[42] The 2021 Regulations revoked and replaced the 2018 Regulations.

[43] The 2021 Regulations was made to come into operation or into force retrospectively on 1 January 2019.

[44] The 2021 Regulations by the First Schedule provided a list of 20 Labuan entities carrying on Labuan trading activities and prescribed the substance requirement for these entities.

[45] Additionally, the 2021 Regulations by the Second Schedule, also provided two Labuan entities carrying on a Labuan non-trading activity along with their corresponding prescribed Substance Requirement.

[46] Based on the 2021 Regulation, the applicants in Application for Judicial Review No LBN-25JR-75/5 of 2021 (HC) (Category A); and in Application for Judicial Review No LBN-25JR-18/4 of 2021 (HC) (Category B) would fall within item 20 of the First Schedule of the 2021 Regulations retrospectively. In order to be eligible for the lower tax rate under LBATA for years of assessment ('YA') 2019 and 2020, they would be required to meet the prescribed substance requirements as set out in the 2021 Regulations.

[47] Item 20 of the First Schedule to the 2021 Regulations is reproduced as follows:

FIRST SCHEDULE

[Regulation 2 and 4]

(1) No.	(2) Labuan entity carrying on a Labuan trading activity	(3) Minimum number of full time employees in Labuan	(4) Minimum amount of annual operating expenditure in Labuan (RM)
...			
20	Labuan entity that carries on any one or more of the following business activity: (a) administrative services; (b) accounting services; (c) legal services; (d) backroom processing services; (e) payroll services; (f) talent management services; (g) agency services; (h) insolvency related services; (i) management services other than Labuan company management under item 17	2	50,000

[48] Based on the 2021 Regulations, the applicants in Application for Judicial Review No LBN-25–17/6 of 2021 (HC) (Category C) would fall and be categorized under item 2 of the Second Schedule thereunder. Retrospectively, they would be required to meet the substance requirements prescribed for item 2 in order to be eligible for the lower tax rate of 3% under the LBATA for the years of assessment (YA) 2019 and 2020.

[49] Item 2 of the Second Schedule to the 2021 Regulations is also reproduced as follows:

FIRST SCHEDULE

[Regulation 2 and 4]

(1) No.	(2) Labuan entity carrying on a Labuan non-trading activity	(3) Minimum number of full time employees in Labuan	(4) Minimum amount of annual operating expenditure in Labuan (RM)
2	Labuan entity that undertakes pure equity holding activities	Exempted under the Labuan Business Activity Tax (Exemption) Order 2020 [P.U. (A) 177/2020]	20,000.00

THE LEGALITY OF THE 2018 REGULATIONS MADE BY DEPUTY PRIME MINISTER AND AMENDED BY THE 2020 REGULATIONS MADE BY THE MINISTER OF FINANCE

[50] The 2018 Regulations which first prescribed the substance requirements was made by the Deputy Prime Minister.

[51] However, by s 2 of the LBATA, the Minister authorised to prescribe the substance requirements by regulations under s 2B(1)(b) of the LBATA is the Minister for the time being charged with the responsibility for finance, meaning the Minister having control and responsibility with the matter, who is the Minister of Finance.

[52] By s 8(2) of the Interpretation Acts 1948 and 1967 provides that:

> 8 References to 'the High Court', 'the Minister' and 'the Treasury'
>
> (1) ...
>
> (2) A reference to 'the Minister' is a reference to the Minister for the time being responsible for the matter in connection with *which the reference is made*.
>
> (3) ... (Emphasis added.)

[53] Section 2 of the Ministerial Functions Act 1969 provides:

> 2 Functions, styles and titles of Ministers
>
> (1) The Yang di-Pertuan Agong may by order notify in the Gazette —
>
> (a) *that a Minister has been conferred with any functions or has been*

charged with any responsibility in respect of a particular department or subject or that any transfer, to any other Minister, of any of the functions or responsibility referred to has been made;

(b) *that any style or title has been assigned to any Ministers (except the Prime Minister) or that any change in any style and title referred to has been made.*

(2) *An order made by the Yang di-Pertuan Agong under this section —*

(a) *may provide for the transfer of any property, rights or liabilities held, enjoyed or incurred by any Minister in connection with any functions conferred or transferred; and*

(b) *may contain such other provisions as may be necessary or expedient for the purpose of giving effect to the order*.

[54] It seems that there is no order of notification in the *Gazette* by the Yang di-Pertuan Agong conferring or designating the Deputy Prime Minister with the functions and responsibility for the country's finance during the time when the 2018 Regulations were enacted by the Deputy Prime Minister.

[55] In accordance with the maxim *delegatus non potest delegare*, a statutory power must be exercised only by the body or officer on whom it has been conferred, unless sub-delegation of the power is authorised by express words or necessary implication.

See: *State Public Service Commission, Sarawak v Sarjit Singh Khaira* [2000] 4 MLJ 353 (FC); *Public Prosecutor v Kit Chee Wan* [1999] 1 MLJ 16 and *M Ratnavale v The Government of The Federation of Malaya* [1963] 1 MLJ 393

[56] Statutory provisions in respect of sub-delegation are strictly construed.

See: *M Ratnavale v The Government of the Federation of Malaya*.

[57] There is no provisions in LBATA to empower or authorise the Minister of Finance or anybody to further sub-delegate the power to make regulations under ss 2B(1)(b) and 21 of theLBATA.

[58] The power conferred upon the Minister of Finance to make regulations to prescribe the substance requirements under ss 2B(1)(b) and 21 of the LBATA cannot be further sub-delegated to any other persons.

See: *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162

[59] Strictly construed, the 2018 Regulations are therefore ultra vires and invalid.

See: *Public Prosecutor v Tan Kim Yong* [1997] MLJU 125; [1998] 1 CLJ 74.

[60] That being the case, the 2020 Regulations made by the Minister of Finance to amend the 2018 Regulations which was not validly made at the first place, has no effect too.

[61] In the hearing of their applications for judicial review, the applicants are not precluded from calling into question, the legality of these regulations

See: *Syed Ibrahim bin Syed Mohd & Ors v Esso Production Malaysia Incorporated* [2004] 2 MLJ 49.

NO SUBSTANCE REQUIREMENTS PRESCRIBED FOR THE BUSINESS ACTIVITY OF APPLICANTS AND NO SPECIFIC PROVISION TO DISQUALIFY APPLICANTS TO BE TAXED UNDER LBATA

[62] As the 2018 Regulations and 2020 Regulations were not validly made, as at the time the Deputy Director of Inland Revenue Board issued the impugned letter dated 5 February 2021 (exh TKS66, at p 6197–6214 of encl 4 in Judicial Review No LBN-25JR-75/5 of 2021) and at the time the MOF issued the letter impugned letter dated 1 April 2021, the applicants were Labuan entities as specified in the Schedule referred to under s 2B(1)(a) of the LBATA carried on Labuan business activities without any substance requirements under s 2B(1)(b) lawfully prescribed by any valid regulations made and in force at the material times.

[63] Tax statutes have to be construed strictly. There must be clear and expressed provisions in the statutes to render a taxpayer liable to be charged to tax. Any ambiguity in the provisions in the tax statutes in that respect has to be construed in favour of a taxpayer.

See: *Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428 (CA), *Director-General of Inland Revenue v Highlands Malaya Plantations Ltd* [1988] 2 MLJ 99 at 104 (SC) and *National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99 at 106 (SC).

[64] That being the case, at the material times the applicants therefore, were only subject to be charged to tax under s 4 of the LBATA and not under ITA by

s 3B thereunder.

[65] That being the case, the letter dated 5 February 2021 issued by the DGIR relying on the invalid 2018 Regulations and requiring the applicants to submit the Tax Return Form under ITA to be charged to tax thereunder and the letter dated 1 April 2021 of the MOF which decided to the effect that the applicants were subject to the imposition of income tax under the ITA were made without expressly authorised by the law and therefore in excess of authority.

[66] The senior federal counsels for the respondents have not submitted otherwise.

THE 2021 REGULATIONS CANNOT HAVE RETROSPECTIVE EFFECT TO TAKE AWAY THE VESTED RIGHT OF THE APPLICANTS

[67] The senior federal counsels for the respondents submitted that the applicants' applications for judicial review have become academic because of the making of the 2021 Regulations by the MOF on 19 November 2021 *gazetted* as PU (A) 423/2021.

[68] The 2021 Regulations seems to provide a comprehensive list of the applicable Labuan business activities of Labuan entity under LBATA and prescribed with the substance requirements which covered the business activities of all the applicants to take effect retrospectively on 1 January 2019, going back some two years in time, which the applicants have to comply so as not to be subject to the higher tax under ITA.

[69] The senior federal counsels submitted that the applicants' issues were resolved and that the applications for judicial review have been overtaken by the 2021 Regulations.

[70] They submitted that 'the factual substratum underlying the question of the case has ceased' and relying on the Federal Court decision in *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal* [2020] 4 MLJ 773. They submitted that the applicants' applications for judicial review should be withdrawn by the applicants if not, dismissed.

[71] I do not agree that the matters have become academic, particularly in view of the findings that the 2018 Regulations and the 2020 Regulations were invalid.

[72] Firstly, the respondents seemed to maintain the validity of their decisions made in their letters dated 5 February 2021 and 1 April 2021 respectively. **A**

[73] Secondly, the 2021 Regulations were made to apply retrospectively with effect on 1 January 2019. **B**

[74] The applicants have the vested rights as Labuan entities with business activities not required to satisfy any substance requirement and entitled to the benefit of being subjected to be charged to tax at a lower rate under LBATA before the making of the 2021 Regulations. **C**

[75] It is certainly impossible for all the applicants now to go back in time to 2019 to fulfil the substance requirements as prescribed by the 2021 Regulations, in order to avoid being subject to a higher tax rate under the Income Tax Act (the ITA). **D**

[76] I also noted the submission of the federal counsels for the respondents that the tax regime under LBATA is based on preceding Year basis and not current year basis as under ITA. **E**

[77] To require the applicants to go back in time to comply with the substance requirements retrospective is a grave injustice to the applicants. The Legislature could not have intended to confer such authority or power upon the MOF or delegate the authority or power to prescribe the substance requirement to apply retrospectively through the provisions of ss 2B(2) and 21 of the LBATA for the purpose of making regulations. **F**

See: *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 (FC) **G**

[78] There is no express provision in LBATA which empowers the MOF to make regulations to apply retrospectively.

[79] For the purposes of delegated legislative provisions, the authority delegated to legislate by regulations has no power to legislate by the regulations to apply retrospectively so as to take away the vested rights of the citizens unless authorised expressly or by necessary implication by the parent Act, that is LBATA in this case. **H**

I

See: *Kerajaan Malaysia v Wong Pot Heng & Anor* [1997] 1 MLJ 437 (FC) and *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC).

[80] Section 20 of the Interpretation Acts 1948 and 1967 has to be narrowly

and strictly construed not to take away the vested rights of the applicants and subject to s 30 of the same Act.

See: *National Land Finance Co-Operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99 (SC); *Kerajaan Malaysia v Wong Pot Heng & Anor* [1997] 1 MLJ 437 (FC); *Ketua Pengarah Hasil Dalam Negeri v Malaysian Co-Operative Insurance Society Ltd* [2000] 1 MLJ 561 (CA); *Syed Ibrahim bin Syed Mohd & Ors v Esso Production Malaysia Incorporated* [2004] 2 MLJ 49 (CA); *Multi-Purpose Holdings Bhd v Ketua Pengarah Hasil Dalam Negeri* [2006] 2 MLJ 498 (CA); *Society of La Salle Brothers v Ketua Pengarah Hasil Dalam Negeri* [2018] 1 MLJ 376 (CA); and *Engineering Analysis Centre of Excellence Private Ltd v Commissioner of Income Tax and another* 23 ITLR 569

[81] The 2021 Regulations made by MOF cannot take away the vested rights of the applicants. The 2021 Regulations has to be construed to apply and I hold that they apply only to the applicants prospectively.

WHETHER THE LETTERS OF DGIR AND MOF IMPUGNED ADVERSELY AFFECTED THE APPLICANTS

[82] The learned Senior Federal Counsels for the respondents again submitted that the applicants were not 'adversely affected' by the impugned letters issued by the DGIR and the MOF respectively as those letters were merely expressions of opinion or understanding of the DGIR and MOF respectively.

[83] They further contended that the applicants had not submitted any tax returns or documentation to the Inland Revenue Board of Malaysia, and that no assessment or decision had been made by the DGIR regarding each individual applicant.

[84] These arguments were raised by the learned senior federal counsels during the leave application for judicial review by the applicants, and they were within their rights to raise them again during the substantive hearing of the applications for judicial review.

[85] After considering the submissions of the learned senior federal counsels, the learned counsels for the applicants and revisiting the issues raised in relation to these matters, for the reasons as given in my grounds of decision dated 2 September 2021 granting the applicants leave for judicial review, I maintain my finding that the decisions if not, the action by two letters of the respondents respectively adversely affected the applicants and therefore amendable to judicial review.

THE APPLICANTS' APPLICATION FILED OUT OF TIME

[86] The learned senior federal counsels for the respondents submitted that the applications herein were out of time by contending that the grounds for the applications first arose and were communicated when the 2018 Regulations were *gazetted* on 31 December 2018.

[87] I respectfully disagree with this submission. Firstly, the impugned decisions or actions being challenged are the two letters dated 5 February 2021 and 1 April 2021 issued by the respondents respectively, which were based on the validity of the 2018 Regulations that I have found to be invalid.

[88] The applicants are entitled to apply for judicial review of the decisions in or actions by the two impugned letters of the respondents respectively without first applying to set aside the 2018 Regulations on the ground of their invalidity.

[89] As I have previously held, the applicants are not precluded from contending that the 2018 Regulations were invalid in their applications for judicial review.

PRONOUNCEMENT AND ORDERS.

[90] In the premises, in respect Application for Judicial Review No LBN-25JR-75/5 of 2021 (HC); Application for Judicial Review No LBN-25JR-18/4 of 2021 (HC) and Application for Judicial Review No LBN-25–17/6-2021 (HC), I granted the applicants therein, the following orders:

(a) an order of certiorari that the decision of the first respondent contained in his letter dated 5 February 2021 be removed into this court and quashed;

(b) an order of certiorari that the decision of the second defendant contained in his letter dated 1 April 2021 be removed into this court and quashed;

(c) a declaration that the 2018 Regulations and the 2020 Regulations are invalid in law; and

(d) a declaration that for the purpose to be charged to tax by the 1st Respondent, the 2021 Regulations only applies, operates and has effect on the applicants prospectively as from the date of its making (ie 19 November 2021) and has no retrospective operation, effect and application upon the applicants prior to the date of its making.

[91] The applicants in these three applications for judicial review are entitled to costs which I allow in the sum of RM25,000 for each of the three applications.

[92] Pursuant to the agreement between the parties, I grant similar orders in favour of the other applicants in their applications as listed under respective Category A, B and C tabulated (except applicant in LBN-25JR-4/3 of 2021 — Palmsphere (L) Bhd (item no 3)) and as attached hereto with costs of RM1,000 for each of the applications.

ATTACHMENT

Category A – "Code 23" cases
(DGIR's Decision of 5.2.2021 & MOF's Decision of 1.4.2021)

No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U.(A) 392/2018, P.U.(A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRB?	Appeal to SCIT filed?
				Company's documents	Common correspondence		
1.	LBN-25JR-1/3-2021 AFG International Inc.	23.3.2021	√	1-5	6-8 (same)	X	N/A
2.	LBN-25JR-2/3-2021 Skin Fitness Inc.	23.3.2021	√	1-6	7-9 (same)	X	N/A
3.	LBN-25JR-4/3-2021 Palmsphere (L) Bhd	30.3.2021	√	1-7	8-10 (same)	X	N/A
4.	LBN-25JR-5/4-2021 Troop London Inc.	1.4.2021	√	1-5	6-8 (same)	X	N/A
5.	LBN-25JR-6/4-2021 World Liner Inc.	1.4.2021	√	1-6	7-9 (same)	X	N/A
6.	LBN-25JR-7/4-2021 Marketa Limited	1.4.2021	√	1-4	5-7 (same)	X	N/A
7.	LBN-25JR-8/4-2021 Linbaq Consultancy Limited	5.4.2021	√	1-6	7-10 (same)	X	N/A
8.	LBN-25JR-9/4-2021 WW Galaxy Ltd.	5.4.2021	√	1-5	6-10 (same)	X	N/A
9.	LBN-25JR-10/4-2021 IStudy Inc.	6.4.2021	√	1-5	6-8 (same)	X	N/A
10.	LBN-25JR-11/4-2021 International Awards Associate Inc.	7.4.2021	√	1-5	6-8 (same)	X	N/A
11.	LBN-25JR-12/4-2021 Dragonfly Tech Solution Ltd	9.4.2021	√	1-5	6-8 (same)	X	N/A
12.	LBN-25JR-13/4-2021 Goodrich Co. Ltd.	12.4.2021	√	1-5	6-10 (same)	X	N/A
13.	LBN-25JR-14/4-2021 Salco Metals Ltd	13.4.2021	√	1-2	3-5 (same)	X	N/A
14.	LBN-25JR-15/4-2021 Maverick Mavens Limited	13.4.2021	√	1-6	7-9 (same)	X	N/A
15.	LBN-25JR-16/4-2021 9Media Online Inc.	13.4.2021	√	1-5	6-10 (same)	X	N/A
16.	LBN-25JR-17/4-2021 Bernhard Schulte Shipmanagement (L) Limited	13.4.2021	√	1-5	6-9 (same)	X	N/A
17.	LBN-25JR-19/4-2021 Alba Ltd	14.4.2021	√	1-5	6-8 (same)	X	N/A

No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U.(A) 392/2018, P.U.(A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRB?	Appeal to SCIT filed?
				Company's documents	Common correspondence		
18.	LBN-25JR-20/4-2021 Aegis International Ltd	15.4.2021	√	1-3	4-6 (same)	X	N/A
19.	LBN-25JR-21/4-2021 Galaxy Services Corporation	15.4.2021	√	1-5	6-10 (same)	X	N/A
20.	LBN-25JR-22/4-2021 Valiant Capital Corp.	15.4.2021	√	1-5	6-10 (same)	X	N/A
21.	LBN-25JR-23/4-2021 Abraxas Limited	16.4.2021	√	1-5	6-10 (same)	X	N/A
22.	LBN-25JR-24/4-2021 Piranha Ltd	16.4.2021	√	1-5	6-8 (same)	X	N/A
23.	LBN-25JR-25/4-2021 Southern Cross International Ltd	16.4.2021	√	1-5	6-8 (same)	X	N/A
24.	LBN-25JR-26/4-2021 Firstfloor CC II Limited	19.4.2021	√	1-6	7-11 (same)	X	N/A
25.	LBN-25JR-27/4-2021 Affinity Ltd	19.4.2021	√	1-5	6-8 (same)	X	N/A
26.	LBN-25JR-28/4-2021 Amberley Asia Ltd	19.4.2021	√	1-5	6-8 (same)	X	N/A
27.	LBN-25JR-29/4-2021 Asia Global Exim Ltd	20.4.2021	√	1-5	6-8 (same)	X	N/A
28.	LBN-25JR-30/4-2021 Lotus Capital Corp.	20.4.2021	√	1-5	6-9 (same)	X	N/A
29.	LBN-25JR-31/4-2021 Quasar Technology Pte. Ltd.	20.4.2021	√	1-6	7-11 (same)	X	N/A
30.	LBN-25JR-32/4-2021 Mega Resources Private Limited & Mega Mineral Pte Ltd	20.4.2021	√	1-10	11-14 (same)	X	N/A
31.	LBN-25JR-33/4-2021 Goldhill International Limited	20.4.2021	√	1-4	5-8 (same)	X	N/A
32.	LBN-25JR-35/4-2021 WA Pro Logistics Co Ltd	21.4.2021	√	1-3	4-6 (same)	X	N/A
33.	LBN-25JR-36/4-2021 SG Labuan Limited	22.4.2021	√	1-5	6-10 (same)	X	N/A
34.	LBN-25JR-38/4-2021 Dominion Global Corp.	22.4.2021	√	1-9	10-14 (same)	X	N/A
35.	LBN-25JR-39/4-2021 Dubor Asia Ltd.	22.4.2021	√	1-5	6-10 (same)	X	N/A
36.	LBN-25JR-40/4-2021 Direct Wave Ltd	22.4.2021	√	1-5	6-8 (same)	X	N/A

No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U.(A) 392/2018, P.U.(A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRB?	Appeal to SCIT filed?
				Company's documents	Common correspondence		
37.	LBN-25JR-41/4-2021 Global Assets Limited	23.4.2021	√	1-6	7-10 (same)	X	N/A
38.	LBN-25JR-42/4-2021 Ultimate Limited	23.4.2021	√	1-6	7-11 (same)	X	N/A
39.	LBN-25JR-43/4-2021 Infinitum Ltd	23.4.2021	√	1-2	3-5 (same)	X	N/A
40.	LBN-25JR-44/4-2021 Karl Spark Inc.	23.4.2021	√	1-3	4-6 (same)	X	N/A
41.	LBN-25JR-45/4-2021 KPG Synergy Ltd	26.4.2021	√	1-3	4-6 (same)	X	N/A
42.	LBN-25JR-46/4-2021 Ramsi Shipping & Trading Limited	26.4.2021	√	1-5	6-10 (same)	X	N/A
43.	LBN-25JR-47/4-2021 Jagrow Incorporated	26.4.2021	√	1-5	6-10 (same)	X	N/A
44.	LBN-25JR-48/4-2021 Images In Motion (L) Inc.	27.4.2021	√	1-5	6-8 (same)	X	N/A
45.	LBN-25JR-49/4-2021 Teiway Ltd	29.4.2021	√	1-6	7-11 (same)	X	N/A
46.	LBN-25JR-50/4-2021 Grand Rich Inc.	29.4.2021	√	1-6	7-11 (same)	X	N/A
47.	LBN-25JR-51/4-2021 Finwave Limited	29.4.2021	√	1-5	6-10 (same)	X	N/A
48.	LBN-25JR-52/4-2021 Executive Ship Management Limited & Executive Ship Management (P) Limited	29.4.2021	√	1-11	12-16 (same)	X	N/A
49.	LBN-25JR-53/4-2021 C-Quest Capital Stoves Asia Ltd, Ecogas Asia Limited & C-Quest Capital LED Asia Ltd	29.4.2021	√	1-11	12-16 (same)	X	N/A
50.	LBN-25JR-54/5-2021 Global Engineering Services Limited	3.5.2021	√	1-5	6-7 (same)	X	N/A
51.	LBN-25JR-55/5-2021 Blue Roots Ltd.	3.5.2021	√	1-5	6-10 (same)	X	N/A
52.	LBN-25JR-56/5-2021 Flextronics Marketing (L) Ltd, Flextronics Mechanicals Marketing (L) Ltd, Flextronics Sales & Marketing	3.5.2021	√	1-10	11-15 (same)	X	N/A

No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U.(A) 392/2018, P.U.(A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRB?	Appeal to SCIT filed?
				Company's documents	Common correspondence		
	North Asia (L) Ltd and Flextronics Industries Marketing (L) Ltd						
53.	LBN-25JR-57/5-2021 Gryphon International Inc	3.5.2021	√	1-5	6-10 (same)	X	N/A
54.	LBN-25JR-58/5-2021 Mascot Ltd.	3.5.2021	√	1-6	7-11 (same)	X	N/A
55.	LBN-25JR-59/5-2021 Mechanical & Electrical Consulting Services Ltd.	3.5.2021	√	1-4	5-9 (same)	X	N/A
56.	LBN-25JR-60/5-2021 Silverknows CMB Ltd	3.5.2021	√	1-5	6-10 (same)	X	N/A
57.	LBN-25JR-61/5-2021 Ouya Trading Ltd. & Grafix and Koko Co. Ltd	3.5.2021	√	1-11	12-16 (same)	X	N/A
58.	LBN-25JR-62/5-2021 Samling Elegant Living Trading (Labuan) Limited	3.5.2021	√	1-6	7-10 (same)	X	N/A
59.	LBN-25JR-63/5-2021 Ange Capital Ltd.	3.5.2021	√	1-5	6-10 (same)	X	N/A
60.	LBN-25JR-64/5-2021 Naga Securities (Engineering and Consulting) Co Ltd	3.5.2021	√	1-4	5-9 (same)	X	N/A
61.	LBN-25JR-65/5-2021 Securiteeh Engineering (Asia) S.A.	3.5.2021	√	1-4	5-9 (same)	X	N/A
62.	LBN-25JR-66/5-2021 Xanex Limited	4.5.2021	√	1-5	6-8 (same)	X	N/A
63.	LBN-25JR-67/5-2021 TPT Management Ltd & Emunah Limited	4.5.2021	√	1-10	11-13 (same)	X	N/A
64.	LBN-25JR-68/5-2021 Persatuan Syarikat-Syarikat Amanah Labuan (Association of Labuan Trust Companies) **& 16 others**	4.5.2021	√	1	2-24 (same)	X	N/A
65.	LBN-25JR-69/5-2021 Pomona Limited	4.5.2021	√	1-5	6-10 (same)	X	N/A
66.	LBN-25JR-70/5-2021 Maga Jeff Mining Holding Co Ltd	4.5.2021	√	1-5	6-10 (same)	X	N/A
67.	LBN-25JR-71/5-2021 KTMJ Co., Ltd.	4.5.2021	√	1-4	5-7 (same)	X	N/A

No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U.(A) 392/2018, P.U.(A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRB?	Appeal to SCIT filed?
				Company's documents	Common correspondence		
68.	LBN-25JR-72/5-2021 Core4u International Ltd	4.5.2021	√	1-4	5-9 (same)	X	N/A
69.	LBN-25JR-73/5-2021 Worldwide Trading Ltd	4.5.2021	√	1-5	6-9 (same)	X	N/A
70.	LBN-25JR-75/5-2021 *Bright World Trading Co Ltd **& 62 others**	4.5.2021	√	1-63	64-66 (same)	X	N/A
71.	LBN-25JR-76/5-2021 Tristar Global Limited	4.5.2021	√	1-6	7-11 (same)	X	N/A
72.	LBN-25JR-77/5-2021 Macworld Industries Limited	4.5.2021	√	1-6	7-11 (same)	X	N/A
73.	LBN-25JR-78/5-2021 Bumi Armada (Labuan) Ltd & Bumi Armada Navigation Labuan Limited	4.5.2021	√	1-9	10-14 (same)	X	N/A
74.	LBN-25JR-79/5-2021 PKT Global Logistics (Labuan) Ltd	4.5.2021	√	1-5	6-10 (same)	X	N/A
75.	LBN-25JR-80/5-2021 Arom Grips Ltd	4.5.2021	√	1-5	6-10 (same)	X	N/A
76.	LBN-25JR-81/5-2021 Asset Opportunities Ltd.	4.5.2021	√	1-5	6-10 (same)	X	N/A
77.	LBN-25-1/6-2021 Dyson Sphere Inc.	4.6.2021	√	1-5	6-10 (same)	X	N/A
78.	LBN-25-2/6-2021 Bernhard Schulte Shipmanagement (L) Limited	10.6.2021	√	1-5	6-12 (same)	X	N/A
79.	LBN-25-3/6-2021 Big Apple Agency, Inc	10.6.2021	√	1-5	6-10 (same)	X	N/A
80.	LBN-25-4/6-2021 Anglo-Eastern (Labuan) Limited	10.6.2021	√	1-4	5-10 (same)	X	N/A
81.	LBN-25-5/6-2021 Five Stones Inc Limited	10.6.2021	√	1-4	5-10 (same)	X	N/A
82.	LBN-25-6/6-2021 Linbaq Consultancy Limited	14.6.2021	√	1-6	7-12 (same)	X	N/A
83.	LBN-25-7/6-2021 Xeraya Capital Labuan Ltd	14.6.2021	√	1-4	5-11 (same)	X	N/A
84.	LBN-25-8/6-2021 DavMar Consulting Limited	14.6.2021	√	1-4	5-10 (same)	X	N/A
85.	LBN-25-9/6-2021 World Liner Inc.	15.6.2021	√	1-6	7-12 (same)	X	N/A

No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U.(A) 392/2018, P.U.(A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRB?	Appeal to SCIT filed?
				Company's documents	Common correspondence		
86.	LBN-25-10/6-2021 MLSCF Management (Labuan), LLP	15.6.2021	√	1-4	5-11 (same)	X	N/A
87.	LBN-25-11/6-2021 AFG International Inc.	15.6.2021	√	1-5	6-12 (same)	X	N/A
88.	LBN-25-14/6-2021 Troop London Inc.	15.6.2021	√	1-5	6-11 (same)	X	N/A
89.	LBN-25-15/6-2021 9Media Online Inc.	15.6.2021	√	1-5	6-12 (same)	X	N/A
90.	LBN-25-16/6-2021 Maverick Mavens Limited	16.6.2021	√	1-6	7-11 (same)	X	N/A
91.	LBN-25-18/6-2021 C Global Trade and Investment, Inc. and CCT-CBI Global Management, Inc.	16.6.2021	√	1-8	9-15 (same)	X	N/A
92.	LBN-25-19/6-2021 Marketa Limited	16.6.2021	√	1-4	5-10 (same)	X	N/A
93.	LBN-25-20/6-2021 Skin Fitness Inc.	16.6.2021	√	1-6	7-13 (same)	X	N/A
94.	LBN-25-21/6-2021 WW Galaxy Ltd.	16.6.2021	√	1-5	6-12 (same)	X	N/A
95.	LBN-25-22/6-2021 Universal Resources Ltd	16.6.2021	√	1-4	5-9 (same)	X	N/A

Category B – Cases not falling under Codes 1 to 23 (DGIR's Decision of 5.2.2021 & MOF's Decision of 1.4.2021)

No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U.(A) 392/2018, P.U.(A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRB?	Appeal to SCIT filed?
				Company's documents	Common correspondence		
96.	LBN-25JR-18/4-2021 *FTE International Ltd & Forestry Timber Flooring International Ltd	14.4.2021	√	1-10	11-15 (same)	X	N/A
97.	LBN-25JR-34/4-2021 Interselect N. V.	20.4.2021	√	1-5	6-8 (same)	X	N/A
98.	LBN-25JR-37/4-2021 Alfa Trading Limited	22.4.2021	√	1-5	6-10 (same)	X	N/A
99.	LBN-25JR-74/5-2021 LKC Maritime Ltd & LKC International Ltd	4.5.2021	√	1-2	3-5 (same)	X	N/A
100.	LBN-25-12/6-2021 Mirai Inc.	15.6.2021	√	1-4	5-10 (same)	X	N/A
101.	LBN-25-13/6-2021 Logii Inc.	15.6.2021	√	1-4	5-10 (same)	X	N/A

Category C – Code 21 made to apply retrospectively (MOF's Decision of 1.4.2021)

No.	Case No. & Name of Applicant(s)	Date of Filing	Legal issue: P.U.(A) 392/2018, P.U.(A) 375/2020 and LBATA	Exhibits		Notice of Assessment raised by IRB?	Appeal to SCIT filed?
				Company's documents	Common correspondence		
102.	LBN-25JR-3/3-2021 ExxonMobil Services (Labuan) Limited	23.3.2021	√	1-6	7-9 (same)	X	N/A
103.	LBN-25-17/6-2021 ExxonMobil Services (Labuan) Limited	16.6.2021	√	1-6	7-13 (same)	X	N/A

Order accordingly.

Reported by Dzulqarnain Ab Fatar